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Nos. 95-1649 and 95-9075

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF KANSAS,
Petitioner and Cross Respondent

v.

LEROY HENDRICKS,
Respondent and Cross Petitioner

On Writs of Certiorari to the Supreme Court of Kansas

BRIEF FOR LEROY HENDRICKS CROSS-PETITIONER

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71 pp

QUESTIONS PRESENTED

1. Is the Kansas Act providing for long term, indefinite confinement of sexually violent predators, K.S.A. 59-29a01 *et seq.*, even though labeled a civil proceeding, so punitive either in purpose or effect as to require that it must be considered criminal?

2. Does the Kansas Sexually Violent Predator Act violate the constitutional prohibition against *ex post facto* laws?

3. Does the Kansas sexually violent predator act violate the constitutional prohibition against double jeopardy?

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OPINIONS BELOW

The opinion of the Supreme Court of Kansas (Pet. App. 1a-59a) is reported at 259 Kan. 246, 912 P.2d 129 (1996).

JURISDICTION

The judgment of the Supreme Court of Kansas was entered on March 1, 1996.

The petition for a writ of certiorari was filed on April 12, 1996. The conditional cross petition for a writ of certiorari was filed on May 13, 1996. Both were granted on June 17, 1996. The jurisdiction of the Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *ex post facto clause* of the United States Constitution states, "No state shall . . . pass any . . . *ex post facto law.*" U.S. Const. Art. 1, Sec. 10.

The double jeopardy clause of the United States Constitution states, ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;" U.S. Const. Amend. V.

The Kansas Sexually Violent Predator Act is set forth in its entirety in Pet. App.

Other Kansas statutes cited are set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

Introduction

Leroy Hendricks was the first person committed to an indefinite term of secure confinement under a statute enacted by the Kansas legislature in 1994. The Sexually Violent Predator Act ("SVP Act"), like the Washington statute after which it was modeled, was a sharp departure from previous sex offenders commitment statutes designed to provide a disposition alternative to a traditional criminal prosecution and sentencing. The SVP Act was aimed

at preventing the release into the community of dangerous sex offenders who had completely served sentences of imprisonment.

Mr. Hendricks was about to be released after serving the sentence recommended by the State as part of a plea agreement and imposed by the court following his convictions for taking indecent liberties with children in 1984, when the District Attorney responsible for criminal prosecutions in Sedgwick County, Kansas—the same office that prosecuted Mr. Hendricks and negotiated his plea agreement—filed a petition seeking commitment under the SVP Act. Mr. Hendricks is not mentally ill, and he does not suffer from a personality disorder as that term is used by mental health professionals. As a result of a jury trial finding him a "sexually violent predator," Mr. Hendricks has been confined at the Larned Correctional Mental Health Facility, a facility operated by the State Department of Corrections. The director of the State's sex offender treatment program admitted, however, at a hearing held several months after Mr. Hendricks' commitment, that he and the others committed under the SVP Act were receiving "essentially no treatment." J.A. 393. On review of Mr. Hendricks' commitment, the Kansas Supreme Court concluded that "[i]t is clear that the primary objective of the Act is to continue incarceration and not to provide treatment." Pet. App. 17a.

This case is before the Court on the State's petition challenging the Kansas Supreme Court's ruling that the SVP Act violates the due process clause of the Fourteenth Amendment and Mr. Hendricks' cross-petition challenging his commitment on the additional grounds presented to but not reached by the Kansas Supreme Court that his confinement is punishment in violation of the ex post facto and double jeopardy clauses.[1]

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[1] Mr. Hendricks' cross-petition also sought review of his equal protection challenge to the statute. This claim will be subsumed in his substantive due process argument, and will not be separately briefed.

The 1984 Plea Agreement

In 1984, Leroy Hendricks was charged with three counts of taking indecent liberties with a child for fondling three thirteen year old boys who came into the electronics shop where he worked. Each charge carried a maximum penalty of 5 to 20 years imprisonment. Pet. App. 3a, K.S.A. 21-3503. The court was authorized to impose consecutive sentences for each count and could have tripled each sentence under the habitual criminal act because of Mr. Hendricks' prior convictions. The maximum allowable sentence for the offenses charged was therefore a total of 45 to 180 years. K.S.A. 21-4504. Had he received the maximum sentence, Mr. Hendricks would have first been eligible for parole in 2007, at age 73, and would have been entitled to mandatory release with good time in 2074. K.S.A. 22-3717(a), (c)(1); 22-2718.

For reasons that do not appear of record, the State elected not to request consecutive sentences or enhancement under the habitual offender provision. Instead, the State reached a plea agreement with Mr. Hendricks, under which it dismissed one count, did not request habitual offender sentencing, and recommended a sentence of 5 to 20 years on the remaining counts, asking the court to impose concurrent sentences. Mr. Hendricks entered a guilty plea on the basis of that agreement, and the court imposed the agreed upon sentence. Pet. App. 16a-17a. Mr. Hendricks was therefore eligible for parole after three years, and entitled to mandatory release if he earned all possible good time credits, after serving ten years. K.S.A. 22-3717(a)(c)(1); K.S.A. 22-3718.

The State also chose to forego the option of referring Mr. Hendricks to a psychiatric facility for evaluation and treatment, if appropriate. Had an evaluation found him in need of treatment, Mr. Hendricks could have been placed in a secure psychiatric facility until treatment was no longer helpful, at which time he would have been returned to court for sentencing. Time spent in the hospital

under this provision would have counted towards any sentence imposed. The length of hospitalization could not have exceeded the maximum possible sentence. K.S.A. 22-3429-3431.

Mr. Hendricks served his sentence without incident. He earned all possible good time and was scheduled for release at the expiration of his sentence, on September 11, 1994. J.A. 5. Mr. Hendricks would have been sixteen days shy of his 60th birthday. While on release, he would have been under parole supervision requiring him to live in a halfway house and participate in group and individual treatment. J.A. 183, 186; Certificate of Conditional Release (Lodged Document).

The Kansas Sexually Violent Predator Act

In July 1993, a young woman named Stephanie Schmidt was raped and murdered by a co-worker who had recently been paroled from a sentence of rape. Her death inspired an *ad hoc* task force that lobbied for legislation intended to prevent similar crimes from happening in the future. The task force included legislators, law enforcement personnel, members of the parole board, probation officers, and concerned citizens. It did not include any mental health professionals. Pet. App. 25a-26a.

The Schmidt Task Force proposed the SVP Act to the 1994 legislature. The same legislature passed proposals that increased the sentences for some violent crimes and permitted an upward departure from the state sentencing guidelines for a defendant found to be a "predatory sex offender". That term is defined as one who "suffers from a mental condition or personality disorder which makes the offender likely to engage in additional acts" constituting serious sexual crimes, following conviction for a crime of extreme sexual violence. K.S.A. 21-4716. That definition is nearly identical to that of a "sexually violent predator".

Unlike these stiffer penalties, the SVP Act specifically targeted sex offenders already convicted and in custody

who were thought to be too dangerous to be released at the end of their terms. The SVP Act proposed to allow the continued custody of those persons, after the expiration of their sentences, by imposing a "civil" commitment upon them. Pet. App. 26a, 27a.

The history of the SVP Act in the Kansas legislature offers insight into the Act's purpose. The proponents of the legislation had the benefit of the Washington Supreme Court's opinion upholding its virtually identical statute and discussing a number of constitutional challenges. The principal sponsor, Senator Bob Vancrum, therefore stressed that, "like the statute upheld by the Washington Supreme Court, the bill does not serve any punitive goal. It is civil in nature and thus does not offend the double jeopardy clause, which applies to criminal matters." J.A. 462. However, other testimony from supporters of the legislation demonstrates that their objective was incapacitative confinement, not treatment. For example, then State Attorney General Robert Stephan testified:

> From the therapeutic perch as legislators, you have an opportunity to pass what might be *the most significant preventive criminal justice legislation* to be presented in this 1994 session of the Kansas Legislature. Most new laws against criminal conduct tend to provide punishment after the victimization has occurred. *Senate Bill 525 will act prospectively and be preventative of criminal conduct and not just punitive.* You have a rare opportunity to pass *a law that will keep dangerous sex offenders confined past their scheduled prison sentence.* As I am convinced *none of them should ever be released,* I believe, as legislators, have an obligation to *enact laws that will protect our citizens through incapacitation of dangerous offenders.*
>
> Under the provisions of the sentencing and parole system in effect prior to July 1, 1993, a violent sex offender could serve the full sentence and be released without any relevant safeguards for the public. In the same manner under the sentencing guidelines, a

> violent, sex offender will be released at the end of the sentence imposed. *With either system, there has been no adequate legal provision to continue incarceration of violent sexual predators past the period of mandatory incarceration.* J.A. 468-69. (Emphasis added)

Special Assistant Attorney General, now Attorney General Carla Stovall, urged enactment of the bill on the basis of her experience as a member of the Kansas Board of Parole:

> Because of the nature of sexually violent crimes and the psychological makeup of those who are prone to commit them, we must take extraordinary precautions to protect society from them. *We cannot open our prison doors and let these animals back into our communities.* If we do—we are accomplices to the atrocities which they will surely commit.
>
> Let me share with you for a moment the utter frustration I experienced as a member of the Kansas Parole Board. I would routinely see sex offenders and pass them as long as possible. . . But when the inmates reached their conditional release date . . . they had to be set free.
>
> The file would come to the board only for the purpose of setting conditions for their release. . . As I would write out those conditions, a knot would always grow in my stomach. I knew the rapists or child molesters were being turned loose on an unsuspecting public to reoffend. . . And there was nothing I could do to prevent it. J.A. 475-76 (Emphasis added).

Neither General Stephan nor General Stovall so much as paid lip service to the goal of treating those committed as sexually violent predators. Rather, as General Stovall put it in her concluding remarks, "[i]t would allow us to keep the sexually violent offenders locked up indefinitely." J.A. 478.

Mental health professionals confirmed that the result of commitment would be prolonged confinement, rather

than treatment leading to release. For example, Tom Locke, on behalf of the Kansas Psychological Association, warned that, "I believe the probability that a professional would take the position that an individual once found to be a SVP is no longer dangerous is very low. Our ability to change an individual's sexual preference for children or eliminate the urge to express sexual and violent impulses together is limited. Lengthy periods of commitment with little likelihood of release are almost inevitable. Perhaps that is the goal of the statute." J.A. 483. James Karlan, director of the Southwest Guidance Center, a sex offender treatment program, echoed this concern:

> Recognizing the potential for a lawsuit should such an offender be released from a mental health inpatient facility and then perpetuate a sexual crime on another victim, no psychiatrist working in a state inpatient hospital will certify that someone in his or her care has essentially been "cured" of being a sexually violent predator as defined in Section 2 and recommend the offender's release into the community. As a result, state inpatient mental health facilities will begin to warehouse offenders . . . *state psychiatric hospitals will essentially be turned into prisons,* . . . J.A. 509 (Emphasis added)

Similarly, in writen testimony on behalf of the Secretary of the Department of Social and Rehabilitation Services (SRS), the agency responsible for providing treatment under the Act, George Vega, the Commissioner of Mental Health and Retardation Services told the Kansas House Judiciary Committee that, "[i]f the process requires professionals to state a sexual predator is cured or not likely to repeat acts of violence before a person is discharged, the professionals will not make such statements which might place their reputations and licenses on the line. This means the patients may never be released." J.A. 567. A member of the Schmidt Task Force reported that the group had studied sex offender treatment, and were aware of doubts about its effectiveness. Although they concluded that because there was no effective treatment

the commitment would amount to a life sentence, the response was: "SO BE IT." J.A. 503 (Emphasis in original).

In addition to learning of doubts in the mental health professions about the efficacy of treatment and the likelihood of release, the Kansas House and Senate committees considering the SVP Act heard specific concerns about the availability of treatment in Kansas. Dr. Locke opined that, "adequate facilities to address this pattern of deviant behavior does not exist within the Department of Social and Rehabilitation Services." J.A. 483, 484. Dr. Mani Lee, Superintendent of the Larned State Hospital voiced similar reservations. Dr. Lee noted that the Hospital had no one currently on staff with expertise in treating sexually violent predators and that the training for new staff was not available in Kansas. He also expressed concerns about whether funding would be available to pay for needed equipment. J.A. 552. The written testimony submitted on behalf of SRS confirmed these fears. J.A. 569. Reservations about treatment had no effect, however, on the legislature's willingness to enact a bill that promised to remove dangerous sex offenders from the community.

The lobbying efforts of the task force were rewarded with the passage of the Sexually Violent Predator Act. Pet. App. 60a-68a, K.S.A. 59-29a01 *et seq.* The Act was patterned after a Washington State statute that was passed in 1990. J.A. 460, 461. Unlike prior sex offender commitment statutes adopted by other states, the Kansas statute, like Washington's legislation, was designed not as an alternative to criminal sentencing but as a way to prolong confinement of persons who have been prosecuted and sentenced. The Act provides for a "civil commitment" of persons who according to the legislative "findings" comprise a "small but extremely dangerous group" of "predators" who do not have a mental defect or disease that renders them appropriate for involuntary treatment under the existing involuntary treatment statutes. The SVP Act applies only to persons prosecuted for sex of-

fenses who are convicted and sentenced, found not guilty by reason of insanity after proof that the person committed the offense, or found incompetent to stand trial and later proved to have committed the charged offense beyond a reasonable doubt in a special hearing. K.S.A. 59-29a03. Members of this group are found to have "antisocial personality features" which are unamenable to existing mental health treatment modalities and are likely to engage in future acts of sexual violence. The legislature also determined that the prognosis for rehabilitating such persons was "poor" and the treatment needs are "very long term". Pet. App. 60a, K.S.A. 59-29a01.

The Act defines "sexually violent predator" as:

> "any person who has been convicted of or charged with a sexually violent offense and who suffers from mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." Pet. App. 60a, K.S.A. 59-29a 02(a).

The Act defines "mental abnormality" as:

> "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menance to the health and safety of others." Pet. App. 60a, K.S.A. 59-29a 02(b).

"Predatory" is defined as:

> "acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization." K.S.A. 59-29a01(c).

"Sexually violent offense" is defined to include nine specific offenses, as well as attempts, conspiracies and solicitations to commit those offenses. It also includes any offense which is determined at sentencing or during the

commitment proceeding to have been sexually motivated. K.S.A. 59-29a01(e).

The Act provides procedural safeguards paralleling those in a criminal case. K.S.A. 59-29a06. The commitment procedures only apply to those who are about to be released from total confinement. K.S.A. 59-29a03. The petition to have a person declared a sexually violent predator is filed shortly before release. K.S.A. 59-29a04. After the filing, a probable cause finding is required. The matter then proceeds to a trial where either party or the judge may request a jury trial. K.S.A. 59-29a05, 29a06. If the person is found to be a sexually violent predator, the court must order commitment to the custody of the Secretary of Social and Rehabilitation Services. SRS, in turn, is empowered to enter into an agreement with the State Department of Corrections to provide a facility. The person is segregated from mentally ill persons. Unlike those civilly committed for mental illness, there are no specific guarantees of rights and privileges accorded the committees.[2]

Once committed, the person's mental condition is examined each year and a report is sent to the court. The court then conducts a review without the committee's presence to determine if there is probable cause to believe that the person's mental abnormality or personality disorder is so changed that the person is safe to be at large will not engage in acts of sexual violence if discharged. If probable cause is found, the court orders a hearing at

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[2] The Act for Care and Treatment of Mentally Ill Persons specifically restricts the use of mediation without consent, K.S.A. 59-2927a; restrictions use of restraints, K.S.A. 59-2928; allows use of the patient's own clothes, personal possessions and money, allows confidential telephones, allows for conjugal visits if facilities are available, allows reception of visitors daily, permits the refusal of involuntary labor and requires payment for work performed, prohibits use of various treatment procedures, requires an explanation of all medications, provides for confidential mail and visitations with those agencies or persons directly involved with the commitment. K.S.A. 59-2929.

which the person committed is entitled to be present. If the court does not find probable cause, there is no hearing, at any time, at which the committed person is entitled to be present. At a hearing the same procedures used in the initial commitment are utilized. K.S.A. 59-29a08.

The Secretary of SRS may authorize a committee to petition for release upon a determination that the persons' mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released. Upon receipt of an authorized petition, the court sets a hearing. That hearing also utilizes the procedures used in the initial commitment. K.S.A. 59-29a10. The committee also may petition the court for release without authorization from the secretary. In such cases, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without hearing.[3]

The Commitment Proceedings

On August 17, 1994, the State filed a petition alleging the Respondent was a sexually violent predator. J.A. 4. Two days later, a hearing was held to determine if there was probable cause to believe the allegation was true.[4]

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[3] In civil commitments of mentally ill persons, a patient is entitled to request a hearing each 90 days during the first six months of treatment and every 180 days thereafter. Upon receipt of a request, the matter is set for hearing. 59-2919, The mental illness commitments also allow for conditional release and total release at the direction of the head of the treatment facility. K.S.A. 59-2924.

[4] The State presented evidence from Dan Crask, a licensed specialist clinical social worker. Based on reports compiled in 1985, he opined that Respondent had pedophilia and that people with pedophilia may stop their behavior occasionally after incarceration, but tend to repeat that behavior over time. J.A. 24-26. He further testified that pedophilia is not a personality disorder. He could not give the court a definition of "mental abnormality". J.A. 28. Based upon that testimony, the court found probable cause and ordered a further evaluation of the Respondent. J.A. 34.

Respondent moved for dismissal of the petition on the grounds that the procedure violated constitutional provisions including the *ex post facto*, double jeopardy, substantive due proces and equal protection. J.A. 32-35. The Court deferred ruling on the motion. J.A. 36-43.

In a pretrial hearing on Respondent's motions to dismiss, Terry E. Davis, an SRS official in charge of implementing the program for the treatment of persons committed under the Act, acknowledged that persons committed under the Act would be housed in a Department of Corrections (DOC) facility. In addition to perimeter security, DOC would also provide security inside the building central control area. Persons committed under the Act would share outdoor recreation areas, weight rooms, libraries and gyms with DOC convicts. The SVP ward would have the same type of rooms, the same type of shower facilities, the same food service, the same laundry service and the same medical facilities as provided to DOC inmates. J.A. 77-81. Mr. Davis stated he was not aware of any programs dealing with sexual offenders that are successful in modifying behavioral outcomes on an involuntary commitment basis. J.A. 91.

At the same hearing, William Cummings, a Department of Corrections official, testified that the Larned Correctional Mental Health Facility is a maximum security facility. He further testified that treatment programs for sex offenders convicted of sexually violent crimes are available at minimum security facilities. J.A. 106-108.

Following further hearing and briefing, the trial court found the commitment procedure to be civil in nature. J.A. 89-94. The evaluation proceeded and the matter came to trial on October 3, 1994.

At the commitment trial, the State began its case by calling Respondent to testify.[5] Mr. Hendricks outlined

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[5] As consequence of its ruling that the commitment proceeding was civil, the district court concluded that Mr. Hendricks had no privilege against self incrimination. J.A. 42.

his family background, J.A. 126-130, as well as his previous sexual offenses against children.[6] J.A. 130-172. He stated that during his latest incarceration he had received no treatment for any sexual disorder.[7] J.A. 179-180. He stated that he had not had any urge to have sexual contact with children since 1985, and he was aware that if he re-offended, he would spend the rest of his life in prison. J.A. 187. He acknowledged however, that he was a "pedophile" and while he hoped that he would not re-offend, the only way he could "guarantee" that he never would was to die. J.A. 190.

Dr. Charles Befort, the chief psychologist at Larned State Hospital, testifying for the State, maintained that Mr. Hendricks was neither mentally ill nor suffering from a personality disorder. J.A. 256-257. He also stated that the term "mental abnormality" was not a diagnostic term. He acknowledged that the term "mental abnormality" was circular, in that the behavior was used both to identify the condition and to predict future behavior. J.A. 263-264. Dr. Befort labeled Mr. Hendricks as a pedophile and stated that, in his interpretation of the statute, pedophilia was a "mental abnormality". He also acknowledged that his interpretation was open to debate. J.A. 271-272. He further opined that Respondent would engage either in acts of sexual violence or sex acts with children if permitted to do so, based in large part on his belief that behavior is a good predictor of behavior. J.A. 247-248. He interpreted the term "likely" in the SVP

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[6] Although Mr. Hendricks did not deny committing sexual offenses, including fondling of genitals and oral sex with both boys and girls, against children, including his stepdaughter and stepson, the State also called witnesses to testify to specific instances of sexual abuse. J.A. 192, 196, 206.

[7] Mr. Hendricks testified that he had been offered treatment in prison but had not enrolled in it. He said his reasons included the desire to work, which would not have been possible in treatment, and that he had been told that there was no cure for his type. J.A. 143, 235. He also told Dr. Befort that he believed the treatment was not effective. J.A. 235.

Act to mean more probable than not. J.A. 260-61, 279. Dr. Befort never hazarded a guess about when in the future Respondent's sexual conduct might occur.

Following instructions and closing arguments, the jury found the Respondent to be a sexually violent predator. J.A. 358. Respondent filed a motion to dismiss, or in the alternative for a new trial, which was heard on October 20, 1994. At that hearing, the Respondent presented evidence that SRS had not entered into any contacts with a provider to furnish sexual predator treatment. No new treatment staff had been hired to provide treatment for committees under the SVP Act. J.A. 366-372. The motion was overruled.

Following the finding that he was a sexual predator. Respondent was committed to Larned State Security Hospital. In February, 1995, he was moved to the Larned Correctional Mental Health Facility, which is maintained by the State Department of Corrections. Dr. Befort, now acting Clinical Director of the Sexual Predator Treatment Program, testified in a subsequent state *habeas corpus* hearing that persons committed under the Act were receiving "essentially no treatment" J.A. 393. Indeed, Dr. Befort acknowledged that he did not feel fully qualified to head the sexual predator treatment program. J.A. 394. Dr. Befort stated that the primary contact he had with Respondent and others committed under the Act was in a group session that he attempted when his schedule permitted. He said the focus of the sessions was the lack of treatment and that there was little if any discussion of the sexual deviancy issues which had led to the commitments. J.A. 399. Dr. Befort concluded that the Respondent and the other persons committed under the Act had received virtually no treatment. J.A. 400. The court ruled that while the petition for relief had alleged no treatment was being provided, there was "ward milieu" therapy being given and therefore denied release even though Dr. Befort testified that "ward milieu" therapy would never result in a committee's release. J.A. 417.

Decision of the Kansas Supreme Court

Respondent appealed the commitment. He argued that the Act, though labeled "civil", was punitive in purpose and effect and therefore violated the prohibition against double jeopardy and *ex post facto* laws. He also argued that he had been denied equal protection of the law because those committed under the SVP Act were subject to more onerous conditions and greater difficulty of release than persons committed under the State civil commitment laws. Respondent further asserted that the Act, by requiring indefinite incarceration of persons without a finding of both dangerousness and mental illness, violated substantive due process. Pet. App. 10a. The Kansas Supreme Court agreed that the Act violated substantive due process without reaching the *ex post facto* and double jeopardy issues.

In making that decision, the Kansas Supreme Court explained:

> We must determine if Hendricks is denied substantive due process based not on his lack of character but, rather, on the merits of his challenge. Mental illness is defined by K.S.A. 59-2902(h) as meaning any person who (1) [is] suffering from a severe mental disorder to the extent that such person is in need of treatment; (2) lacks capacity to make an informed decision concerning treatment; and (3) is likely to cause harm to self or others. Here, neither the language of the Act nor the State's evidence supports a finding that 'mental abnormality or personality disorder' as used in 59-29a02(a), is a 'mental illness' as defined in 59-2902(h). Absent such a finding, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha*. Justice White, speaking for the majority of the United States Supreme Court in *Foucha*, clearly stated that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible. 504 U.S. at 78.

> Similarly, to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible.
>
> In addition, the State's own evidence is that Hendricks was being committed even though he does not suffer from mental illness. Hendricks is not mentally ill, and the criminal offenses for which he was imprisoned were not the result of mental illness. Therefore, as applied to Hendricks, the constitutionality of the Act depends upon a showing of dangerousness without a finding of mental illness. Clearly, the due process standard of Addington and Foucha is not met by the Act as applied to Hendricks. We conclude that the Act violates Hendricks' substantive due process rights. Pet. App. 20a.

While the Kansas Supreme Court did not directly address the issues of double jeopardy, *ex post facto*, and equal protection, it did make findings which are relevant to them. The majority concluded:

> It is clear the overriding concern of the legislature is to continue segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. 59-2901 et seq. If there is nothing to treat under 59-2901, then there is not mental illness. Pet. App. 16a.

The Court concluded,

> It is clear that the primary objective of the Act is to continue incarceration and not provide treatment". Protecting the public is a legitimate exercise of the State's police power. Although the Act is a well-intentioned attempt by the legislature to accomplish that objective, it canont be done in a constitutionally impermissible manner. Having said that, we need to point out that the legislature has pro-

vided the State with other options to achieve that objective and, in addition, has the authority to increase the penalty for sex crimes committed against children." Pet. App. 17a. Justice Larson, joined by Justices McFarland and Six, dissented.

SUMMARY OF ARGUMENT

In 1994, Kansas adopted a statute that applies a severe regime of extended incarceration against individuals already convicted of and punished for criminal offenses. Responding to a public outcry which contended that already-convicted sex offenders posed a danger if released, the State passed a bill requiring potentially life-long incarceration for such individuals found to be "sexually violent predators." The statute applies to individuals who have been held criminally responsible for their conduct and can be imposed upon a person, like Respondent, who the State's own expert asserts is not mentally ill.

This Court has never before confronted such a statute. Unlike the sexually dangerous persons provision considered in *Allen v. Illinois*, 478 U.S. 364 (1986), this statute does not attempt to divert individuals from the criminal process, "disavow punishment," and impose, in lieu of punishment, a commitment to treatment. Rather, the SVP Act only comes into operation *after* the individual has been criminally convicted and punished. Indeed, the commitment for "treatment" in this statute may occur years after the acts giving rise to the need for commitment have occurred. Nor is this procedure intended as a separate indeterminate criminal sentencing statute (*see Specht v. Patterson*, 386 U.S. 605 (1967)), since Respondent's sentence occurred more than a decade ago.

Rather, the purpose and effect of this statute is to prolong the incarceration of individuals whose criminal conduct occurred long before the enactment of the statute. Because that "purpose and effect" is unquestionably punitive, the penalty imposed upon Respondent violates the Constitution's prohibition against *ex post facto* laws.

Moreover, because Respondent is being prosecuted and punished again for criminal offenses adjudicated in 1984, the proceedings violate the Constitution's protections against double jeopardy.

1. Although it would be hard for a layperson or lawyer to contend that labeling a convicted criminal a "predator" and imposing upon him a consecutive indeterminate sentence in maximum security confinement could be anything but punishment, the State argued below that the statute was a legitimate exercise of the State's civil *parens patriae* power, designed to promote "treatment" of sexual predators. However, the conclusion of the Kansas Supreme Court, which is entitled to deference (*see Romer v. Evans*, 116 S.Ct. 1620 (1996); *Reitman v. Mulkey*, 387 U.S. 369 (1967)), is that the purpose of the statute "is to continue incarceration and not to provide treatment." Pet. App. 17a. That conclusion is fully justified by the language of the statute, the history surrounding its enactment, and the implementation of the commitment regime.

The statute is punitive in that it targets only incarcerated individuals ready for release. Whatever treatment interest the state allegedly possesses is confined to these convicts and is also deferred for decades until the convict has served every day of confinement prescribed for the crime. The language of the statute itself demonstrates that incarceration is the goal. In its preamble, it acknowledges that long-term confinement of sexual predators is required and that such people are not amenable to current treatment. In contrast to the dangerous sexual offender statute approved in *Allen*, the Act requires incarceration in a secure facility, and does not permit treatment in a range of facilities appropriate to the individual. That long-term incarceration was the goal of the statute was also evident in the legislative history. The Attorney General urged that Sexual Predators "should [n]ever be released." The task force that proposed the legislation acknowledged that no existing treatment was effective, urged

that the statute would, in effect, create a life sentence, and urged support for the legislation on that basis. Mental health professionals confirmed this reading by assuring the legislature that "no psychiatrist" would ever certify that a mentally responsible sexually violent predator would be suitable for release.

The legislature was repeatedly informed by governmental officials that the Department of Social and Rehabilitation Services had no resources to develop a treatment program. However, since incarceration, rather than treatment, was the goal of the statute, it is no surprise that the legislature made no effort to provide funds or resources to develop a treatment program. Today, Respondent is being visited by a program director who has asserted he is not fully competent to provide treatment and who has acknowledged that Respondent is receiving "essentially no treatment," a finding echoed by the Kansas Supreme Court. Instead of receiving treatment in a therapeutic setting, respondent is incarcerated in a Department of Corrections facility, in a setting indistinguishable from his former convict status, and denied the privileges routinely given to civilly committed inmates in Kansas.

Since the Kansas Supreme Court was correct in its determination that this is not a commitment for treatment, this case is utterly unlike *Allen v. Illinois, supra*, where this Court upheld the Supreme Court of Illinois's characterization of its Sexually Dangerous Persons Act as "essentially civil in nature." 478 U.S. at 367. In *Allen*, this Court properly deferred to the Illinois Supreme Court's characterization that the statute provided for civil proceedings *in lieu of a criminal prosecution*, because the state disavowed any interest in punishment, because it provided for release "after the briefest time in confinement," *id.*, at 370, and because the defendant had failed to show that the confinement imposed a regimen similar to that of convicts. In all relevant respects, the Sexually Violent Predator Act differs from its very distant Illinois

cousin. In Kansas, the State has embraced punishment, not disavowed it, and required service of a criminal sentence before release, and, indeed, has only targeted those already incarcerated for the commitment. Unlike Illinois, the Kansas Supreme Court was aware that under its statute, release would not occur after the "briefest time in confinement" but would rarely if ever occur. Unlike Illinois, in Kansas, the State has disavowed treatment and imposes a regimen equivalent to that imposed on convicts in a facility administered by the Department of Corrections.

2. Once the pretense of treatment is stripped from the statute, there can be no doubt its "purpose and effect" is punitive. The statute imposes involuntary incarceration of a person upon proof that he or she committed a criminal act, the very paradigm of punishment. That one of the reasons for this incarceration is incapacitation of the offender does not render the statute non-punitive. Incapacitation for the protection of society has always been recognized as a core function of the criminal law (*see United States v. Brown*, 381 U.S. 437, 458 (1985); *Foucha v. Louisiana*, 504 U.S. 99 (Kennedy, J., dissenting)), and this court has explicitly found in *Specht v. Patterson*, 386 U.S. 605, 608, 609 (1967), that incapacitation as a sexual psychopath may be criminal punishment even though designed more as incapacitation than retribution.

In addition to the fact of imprisonment, the very language of the Act is punitive. The finding that the individual is a "predator" is, if anything, more stigmatizing than a designation of the individual as criminal, and the subjects of this act were referred to as "animals" during the legislative debate. While such designations may be appropriate for those the state seeks to condemn, they are highly inappropriate for those supposedly the subjects of a therapeutic, non-punitive commitment.

Finally, the criminal nature of this statute is evidenced by its procedural mechanisms. Like a criminal trial, it

is commenced by the district attorney and it requires proof beyond a reasonable doubt that the individual has committed a criminal offense.

3. Because the Sexually Violent Predator Law is, in essence, a punitive statute, its application to Respondent violates the constitutional prohibition against *ex post facto* laws. The Constitution "forbids the application of any new punitive measure to a crime already consummated." *California Dept. of Corrections v. Morales*, 115 S.Ct. 1597, 1601 (1995). The SVP Act obviously constitutes a new punitive measure, in effect imposing a consecutive life sentence upon Respondent. It is also clearly retrospective, since the most recent criminal conduct alleged in the proceeding was Respondent's 1984 conviction, which occurred a decade before enactment of the SVP law.

4. Finally, the SVP proceeding constitutes both a second prosecution and a second punishment, prohibited by double jeopardy. This Court has held on numerous occasions that the Double Jeopardy Clause protects an individual against being prosecuted a second time after conviction for the same offense. In every sense, the SVP proceeding was a second prosecution for Respondent's offense of indecent liberties.

In addition, the SVP proceeding constitutes a second punishment prohibited by the Double Jeopardy Clause. This Court has consistently interpreted double jeopardy as prohibiting the imposition of multiple punishments in separate proceedings. As this Court has noted, "when the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with sanction obtained in the first proceeding." *United States v. Halper*, 490 U.S. 435, 451 n.10 (1989). The SVP proceeding against Mr. Hendricks is a thinly-veiled attempt to seek an addi-

tional term of incarceration against a defendant it believes it may have treated too leniently more than a decade ago. Its attempt at imposing a consecutive lifetime incarceration clearly violates doube jeopardy. .

ARGUMENT

I. COMMITMENT OF A "SEXUALLY VIOLENT PREDATOR" ON THE BASIS OF CRIMINAL CONDUCT AND FOR THE PURPOSE OF INCAPACITATION, IS PUNISHMENT

When the 1994 Kansas Legislature passed the Sexually Violent Predator Act, it stated it was establishing "a civil commitment procedure for the long term care of the sexually violent predator." Pet. App. 60a KSA 59-29a01. But "[t]he Constitution deals with substance not shadows. The inhibition was labeled at the thing, not the name." *Cummings v. Missouri*, 71 U.S. (4 Wall) 277, 325 (1867). The label attached to a penalty by the legislature is not controlling. "[T]he Constitution constrains the State's ability to denominate proceedings as civil and so dispense with the criminal procedure protections provided by the Bill of Rights." *Montana Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1953 (1944) (O'Connor, J., dissenting)

This Court has consistently used a two step approach to determine whether legislation is subject to constitutional restrictions applicable in criminal proceedings, most recently in *United States v. Usery*, Slip Op., June 24, 1996 at 20. First, the Court determines whether the legislature intended the proceedings to be criminal or civil. *Id.* Since the legislators who proposed this statute were fully aware that they could not accomplish their objective of keeping sex offenders locked up after expiration of their sentences through the criminal law, it is no surprise that they attempted to affix a civil label to the proceeding. However, a legislature's description of a statute as civil

does not foreclose the possibility that it has a punitive character. *Kurth Ranch*, 114 S. Ct. at 1945.[8]

The second step is to consider whether the commitment proceedings are so punitive either in purpose or effect that they may not legitimately be viewed as civil in nature, despite the legislature's intent. *United States v. Ursery*, Slip Op. 20, 22 n.3 (quoting *United States v. Assortment of 89 Firearms*, 465 U.S. 354, 365, 366 (1984)). In making the determination of whether a nominally civil statute is penal or regulatory in character, the Court has frequently invoked the test set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168, 169 (1963):

> Whether the statute involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Respondent submits that the Kennedy factors can be distilled into three inquiries. The first two relate to the

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[8] The Court has consistently refused to put off by civil labels when the purpose or effect of legislation is punitive. *Cummings v. Missouri*, *supra* (disqualification from office or from the pursuits of a lawful avocation, is a punishment); *In re Garland*, 4 Wall 333 (1867) (disbarment from practicing law in federal courts); *Lipke v. Lederer*, 259 U.S. 557, 51 S. Ct. 549 (1922) (tax on dealer for violating liquor control laws); *United States v. La Franca*, 282 U.S. 568, 51 S.Ct. 278 (1931) (double tax on illegal sale of liquor); *United States v. Constantine*, 296 U.S. 287 (1935) (excise tax on conducting a retail liquor business; *United States v. Lovett*, 328 U.S. 303 (1946) (ban from government employment, stigmatization of reputation and serious impairment of ability to earn living); *United States v. Halper*, 490 U.S. 435 (1989) (excessive civil penalties); *Kurth Ranch*, *supra* (tax on possession of marijuana). None of these sanctions even approaches the involuntary indefinite confinement provided for by the SVP Act.

idea that punishment is the imposition of a sanction to express society's condemnation of forbidden conduct and moral blameworthiness of the actor. They are: 1) is the sanction historically a form of punishment; 2) is the imposition of the sanction triggered by finding the commission of a criminal offense. The third factor is whether the sanction is adequately explained by a regulatory or remedial purpose, rather than punishment.

Whether a sanction is historically considered punishment is important objective evidence that a person subjected to the sanction will view himself, and be viewed by society, as blameworthy and criminal. Moreover, history helps to define the types of sanctions to which the Framers intended the Bill of Rights and the *ex post facto* clause to apply. A link between the imposition of the sanction and proof that a person's conduct meets the definition of a crime is also strong objective evidence that the sanction is imposed for blameworthy, criminal acts. Finally, the inquiry into proportionality asks whether the alternative civil purpose sufficiently justifies the severity of the sanction imposed to explain away the objective evidence that the sanction is punishment.

In this simplified form, Respondent believes the *Kennedy* test to a large extent explains this Court's many decisions distinguishing punishments from civil remedies. As the *Kennedy* Court acknowledged, in some cases "this problem has been extremely difficult and elusive of solution." 372 U.S. at 168. Here, however, as in *Kennedy*, Respondent believes "[t]he punitive nature of the sanction is evident." *Id.* The striking objective parallels between criminal prosecution and sentencing and commitment under the SVP Act certainly answer the first two questions of the simplified *Kennedy* test affirmatively, as will be demonstrated in detail later in the brief. To begin with Respondent will show that "civil" commitments under the Act cannot be justified by civil interest in treatment.

A. The Primary Objective of the SVP Act is to Incapacitate, Not to Provide Treatment

The Kansas Supreme Court found it "clear that the primary objective of the Act is to continue incarceration and not provide treatment." Pet. App. 17a. The State Supreme Court's understanding of the purpose of state law should be "authoritative" here, just as it was in *Romer v. Evans*, 116 S.Ct. 1620, 1624 (1996). The text of the Act, its legislative history and the history of its implementation offer the "clearest proof" that the civil remedial objective of treatment for mental illness on which this Court relied in *Allen v. Illinois*, 478 U.S. 364 (1986), was, as the Kansas Supreme Court recognized, "incidental, at best" Pet. App. 16a to a statutory scheme intended to confine repeat sex offenders. The Kansas Supreme Court agreed that incapacitation of dangerous offenders was a "legitimate exercise of the State's police power," Pet. App. 17a which Kansas could certainly achieve by adopting a repeat sex offender sentencing provision. What Kansas cannot do, by attaching a "civil label of convenience," *In re Gault*, 387 U.S. at 114, is to extend its police powers beyond the bounds of the Constitution to reach those who have already been punished for their crimes and who committed their offenses before the enactment of the SVP Act. A State cannot defeat the *ex post facto* and double jeopardy prohibitions by cloaking an incapacitative purpose behind the State's *parens patriae* power to provide treatment.

1. *Text*

Several features of the SVP Act demonstrates that commitment under the Act bears no resemblance to past sexual offender commitment schemes or to ordinary civil commitment of mentally ill. In contrast to sexual offender statutes this Court has previously considered, the SVP Act is not an alternative to criminal prosecution or to a tradi-

tional criminal sentence.[9] The Act applies *only* to persons who have already been prosecuted for sex offenses and confined as a result of those prosecutions. K.S.A. 59-29a02 (SVP limited to "any person convicted or charged with a sexually violent offense"); 59-29a03(a) (commitment procedures triggered by anticipated release of convicted offenders, (a)(1), or persons confined as a result of a finding of not guilty by reason of insanity, (a)(2), or incompetency (a)(3)).

Commitment is cumulative to other punishment, not an option for treatable offenders. Moreover, the Act requires the State to defer the "treatment" that is allegedly the purpose of the statute for up to decades after the appearance of the "mental abnormality" that caused the offenses. If in fact that criminal conduct is caused by a mental abnormality that can be treated, and if treatment is indeed the goal of the Act, it would be absurd for the State deliberately to delay the treatment until the punishment had been fully served.[10]

The SVP Act is also not targeted at persons suffering from treatable mental illness. *Compare Allen*, 478 U.S.

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[9] The commitment scheme in *Allen v. Illinois*, for example, was triggered by an arrest and prosecution, but the State was required to elect prosecution or commitment. 478 U.S. at 370. In *Specht v. Patterson*, the sexual phychopath statute provided an alternate form of disposition for a convicted sex offender. 386 U.S. 605 (1967). In *State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County, Minn.*, 309 U.S. 270 (1940), it is not set out whether the commitment procedure followed a criminal arrest. In any event, that fact did not enter into the Court's decision.

[10] This is especially true when the procedure for evaluation and treatment were available to the State prior to the criminal sentencing. The State could have requested that the Respondent be committed for "mental examination, evaluation and report" to a state psychiatric hospital. If the report showed a need for pyschiatric care and treatment, that such treatment might materially aid in a person's rehabilitation and that society and that defendant are not likely to be endangered by said treatment in lieu of confinement or imprisonment, the person could be committed to the state security hospital.

at 370 (recognizing that committees charged with offenses are a subset of the "larger class of mentally ill persons who might be found to be sexually dangerous.") The Kansas Supreme Court noted "[t]he legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. 59-2901 *et seq.* If there is nothing to treat under 59-2901, then there is no mental illness. In that light, the provisions of the Act for treatment appear to be somewhat disingenuous." Pet. App. 16a. Indeed, the State's expert witness conceded that Leroy Hendricks does not suffer from a mental illness or a recognized personality disorder. J.A. 256. Although the SVP Act requires proof of a "mental abnormality", the abnormality consists of nothing more or less than a pattern of sexually deviant conduct. J.A. 263, 264. Therefore, the mental condition that triggers commitment is simply the commission of one or more serious crimes, rather than a condition recognized as amenable to treatment by professionals in any field. The SVP Act also requires confinement in a secure facility, K.S.A. 59-29a07(a), in contrast to civil commitments for mental illness and the statute before the Court in *Allen*, which allowed treatment in a range of different setting appropriate to the needs of the individual and the risk to the community through conditional release. 478 U.S. at 369 n.4. Indeed, it is an irony of this case that the State chose to intervene to commit Respondent for treatment at precisely the time that he was scheduled for release that in fact included treatment.

In addition, the Act explicitly contemplates long term confinement, K.S.A. 59-29a01, in contrast to the statute in *Allen*, which "provided for the treatment of those it commits, and established a system under which the committed persons may be released after the briefest time in confinement." 478 U.S. at 370.

2. *Legislative history*

The hearings in the Kansas legislature emphatically bolster the strong inference from the statute itself that

incarceration, not treatment, was the legislative goal. The proponents of the legislation for the most part ignored the treatment of committees under the Act. Instead, they viewed the Act as—in the Attorney General's words—an "opportunity to pass a law that will keep dangerous sex offenders confined past their scheduled prison sentence." J.A. 468. Both the current and former Attorneys General viewed this confinement as effectively permanent. Attorney General Stephan stated "none of them should ever be released," J.A. 468, while his successor hoped the Act would keep sex offenders "locked up indefinitely." J.A. 478. One of the members of the task force that proposed the legislation bluntly informed the legislature that there were no treatment programs that had been found to be effective, that the effect of the legislation would be lifetime incarceration, and that such an outcome was explicitly contemplated by the task force recommending the legislation. J.A. 503.

The legislature was also well aware, from the testimony it heard, that the release standards in the bill were unlikely ever to be met by those committed as sexual predators. Over and over again, witnesses explained that mental health professionals would not be willing to certify that "sexually violent predators" had been cured and were safe to be released to the community. J.A. 483, 509, 567. Without such certification, committees cannot hope for a release hearing at which they could place the burden of proving their continuing dangerousness on the State. Instead, those committed under the Act face the very real possibility of spending a lifetime behind bars without ever having the right to appear in person before a judge for a commitment hearing.[11]

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[11] The release procedures for those committed under the SVP Act stand in stark contrast to the procedures for those committed under the State's mental illness commitment provisions. In the case of a commitment under the mental illness law, the patient is entitled to petition for release every ninety days during the first

Finally, the legislative history also shows that the Kanhas legislature was aware that the State did not have the capacity to offer treatment to persons committed under the Act. Warnings about the inadequacy of treatment came directly from the government officials who would be responsible for implementation of the Act. They informed the legislature that that there were no persons on the state hospital staff with the expertise to offer the treatment, that no training for any programs was available in the State and that no funds were provided to obtain supplies or expertise. J.A. 569. The fact that the legislature proceeded to authorize commitment without acting to insure adequate treatment demonstrates that treatment was unimportant, "incidental", to the real purpose of the Act. Even improvements in treatment cannot alter the probative force of the warnings the Kansas legislature seemingly ignored as evidence of the legislature's intent to punish, not to cure.

3. *Implementation*

The history of the SVP Act after its adoption only reaffirms that unmistakable conclusion from the history of the legislation and its text: what was important is that sex offenders were not released at the end of their sentences, insanity or competency commitments. The legislature did not provide funding for the SVP treatment. J.A. 541. The State did not enter into contracts to provide treatment before initiating commitments. J.A. 367. And, once Mr. Hendricks entered State custody as the first committed SVP, the State left responsibility for the treatment pro-

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six months of treatment and every 180 days thereafter. K.S.A. 59-2919a. Upon receipt of the request, the matter is set for hearing. Mental illness commitments also allow for conditional release and total release at the direction of the treatment facility without any court involvement. K.S.A. 59-2924. In contrast, those committed under the SVP Act may *never* receive a hearing at which they appear in person, unless the court first finds probable cause or the SRS so recommends, and a person committed under the SVP Act may *never* be released without court involvement.

gram in the hands of a clinical director who admitted he was unqualified, and who acknowledged under oath that Mr. Hendricks and the other committees were receiving "essentially no treatment". J.A. 392, 393. Moreover, because there was no real treatment, there could be no way to satisfy the court that a committees' progress justified release. J.A. 400.

The fact that the confinement under the SVP Act is in a DOC facility in which the daily regimen closely resembles that of DOC inmates is further proof that the intent of the legislature was not to treat. The SVP Act begins with the legislature's determination that "the prognosis for rehabilitating sexually violent predators in a prison setting is poor" K.S.A. 59-29a01. But treatment in a prison setting is precisely what the State elected to give them. The Kansas Supreme Court found from the record that "treatment of sexually violent predators is all but nonexistent." Pet. App. 16a. Instead of treatment, the record shows that SVP committees received maximum security confinement indistinguishable in most respects from the conditions of convicted and sentenced prisoners also assigned to the Larned Correctional Mental Health Facility. The two types of inmates have the same kind of rooms, shower facilities, food service, laundry service and medical care. They also share the same outdoor recreation areas, weight rooms, libraries and gym. J.A. 78-81.[12]

This Court should give deference to the "authoritative construction" *Romer v. Evans,* 116 S.Ct. 1620, 1624 (1996), *Reitman v. Mulkey,* 387 U.S. 369, 373 (1967),

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[12] By contrast, civil committees in Kansas are guaranteed many specific rights. They are guaranteed the right to wear their own clothing, to use their own possessions, to communicate by phone, to receive conjugal visits if facilities are available, to receive visitors each day, to refuse involuntary labor and to be paid for work. K.S.A. 59-2929. None of these rights are specifically provided for by the SVP Act. The differences in the manner of incarceration provided for by the two schemes clearly indicates that the commitment under the Act is punitive rather than rehabilitative.

of the Kansas Supreme Court's interpretation of the purpose and effect of the SVP Act just as it did to the Illinois Supreme Court in *Allen* and find that, unlike in *Allen*, "the primary objective of the SVP Act is to continue incarceration and not provide treatment."

B. Imprisonment Following Adjudication of Guilt is Historically Deemed Punishment

Once the pretense of treatment is stripped from the SVP Act, its punitive character is unmistakable. History teaches that the *ex post facto* clause and Double Jeopardy Clause must apply to Mr. Hendricks' commitment because it is indistinguishable from a prison sentence. The involuntary incarceration of a person upon proof that he or she committed a criminal act is our paradigm of punishment. To treat imprisonment following adjudication for criminal conduct as a civil remedy "would only be a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond a reasonable doubt to have violated a criminal law." *Foucha v. Louisiana*, 504 U.S. at 83.

In contrast to *Ursery*, where the Court relied on the long history of a *in rem* forfeiture as a civil sanction that could be imposed separately from and in addition to criminal punishment, the Kansas SVP Act has no comparable lineage. Unlike sex offender commitment statutes offered as an alternative to criminal prosecution and punishment, *see Allen*, 478 U.S. 364 (1986), or special sex offender treatment programs offered as an alternative disposition following a conviction, *see Specht*, 386 U.S. 605 (1967), the Kansas statute is explicitly designed not to divert sex offenders in need of treatment from ordinary criminal punishment but rather to add incapacitative confinement on top of punishment already imposed. The Kansas SVP Act is descended directly from legislation enacted in Washington State in 1990, which, like the Kansas statute,

was precipitated by public outcry over a heinous offense committed by a released sex offender. Although the Court has decided a number of cases involving "dangerous sex offender" or "sexual psychopath" statutes, none of these cases involved a statute that resembles the SVP in purpose or effect.

1. *Confinement for the purpose of incapacitation is punishment*

The historically recognized purposes of punishment are served by the Act. "It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *United States v. Brown*, 381 U.S. 437, 458 (1965). *Accord, Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). "Incapacitation for the protection of society is not an unusual ground for incarceration. '[I]solation of the dangerous has always been considered an important function of the criminal law.' " *Foucha v. Louisiana*, 504 U.S. at 99 (Kennedy, J., dissenting) (quoting *Powell v. Texas*, 329 U.S. 514, 539 (1968) (Black, J., concurring)).

Indeed, this Court has already explicitly held that incarceration as a sexual psychopath following an adjudication of guilt for the purpose of incapacitation is criminal punishment. *Specht v. Patterson*, 386 U.S. 605 (1967). In *Specht*, this Court reviewed whether the imposition of sentence under the Colorado sexual psychopath law violated due process since it was accomplished without a full hearing. Under that act, the State filed criminal charges and proceeded to trial. If a conviction was had, a separate sentencing procedure was initiated to sentence the person convicted, not under the statute for which he stood convicted, but rather, under the sexual psychopath statutes. The petitioner in that case could have been sentenced for

up to 10 years for the original crime. Under the sexual psychopath provisions he stood to be incarcerated from 1 day to life. In that situation, this Court held, "The punishment under the second Act (the sexual psychopath act) is criminal punishment even though it is designed not so much as retribution as it is to keep individual from inflicting harm. 305 U.S. at 608-609. [Footnote omitted; citing *United States v. Brown*, 481 U.S. at 458] From the Court's determination that the incarceration in *Specht*, which was imposed immediately after conviction, was criminal punishment, it follows that the commitment here, which occurred ten years after the adjudication of guilt and after Hendricks had served the sentence imposed must also be considered punishment." [13]

2. *The conditions of the "commitment" under the SVP Act are indistinguishable from a prison sentence*

An examination of the Act and its consequences leaves no doubt that it imposes what would historically be re-

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[13] That incarceration as a sexually violent predator is criminal punishment is also evident from the actions of the same Kansas legislature that passed the SVP Act in passing a *criminal* sentencing enhancement mandating additional criminal punishment for individuals found to be "dangerous sexual predators". K.S.A. 21-4716(a)(G)(i)(b), (ii). More generally, the sentencing provisions of the Kansas criminal code in effect at the time of Mr. Hendricks sentencing recognize that criminal incarceration serves the purposes of incapacitation, as well as retribution.

> This article shall be liberally construed to the end that persons convicted of a crime shall be dealt with in accordance with their individual characteristics, circumstances, needs and potentialities as revealed by case studies; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, fine or assignment to a community correctional services program whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the offender, or shall be committed for at least a minimum term within the limits provided by law. K.S.A. 21-4601.

garded as punishment. The legislative findings expect the incarceration under the Act to be "very long term" and require that the confinement be accomplished in a "secure facility". K.S.A. 59-29a01. The facility in this case, the Larned Correctional Mental Health Facility, is operated by the Department of Corrections. It is a maximum security facility where committees under the Act have the same rooms, shower facilities, food service, laundry service and medical facilities as DOC inmates. They also share the same outdoor recreation areas, weight rooms, library and gym with DOC inmates.

The DOC provides the facility, perimeter security and internal security to the point of entering the actual quarters of the Sexually Violent Predator area. While under an agreement specifically authorized by the Act, the jailers inside the unit are nominally employees of SRS rather than the Department of Corrections, the name on the uniform of the keeper does not alter the regimen or conditions. As this Court held in *Breed v. Jones*, 421 U.S. 530, 528 (1975), even confinement under the auspices of juvenile authorities is punishment when it is tried, as it is under the Act, to proof that a person has committed a crime.

3. *Adjudication as a sexually violent predator is at least as stigmatizing, if not more, than a criminal conviction*

This Court recognizes the consequences of being found to have committed a criminal act "include both the stigma inherent in such a determination and the deprivation of liberty for many years." *Breed v. Jones*, 421 U.S. at 529. There can be no doubt that labeling a person a "Sexually Violent Predator" serves to publicly stigmatize, disgrace and humiliate a person. The image conjured up by the phrase is of a horrific and inhuman creature. Given the general understanding given to the words, it is not surprising that the individuals who supported the bill described the people who were its subjects as "animals" and "monsters." J.A. 473.

4. *Committment is triggered by the finding beyond a reasonable doubt that a criminal offense has been committed*

The procedures for adjudication under the SVP Act also indicate that from a historical perspective, the SVP adjudication is punitive, for the proceeding closely mirrors that of a criminal trial. The procedure is initiated by the prosecuting attorney (now the Attorney General). There is a probable cause determination. The respondent has the right to counsel and jury trial as provided in criminal cases. Most significantly, without proof beyond a reasonable doubt of the commission of a criminal offense there can be no commitment under the Act. "The compliance with the standard of proof beyond a reasonable doubt is the defining, controlling feature in criminal adjudication, unique to the criminal law". *Foucha,* 501 U.S. at 93 (Kennedy, J., dissenting).

Under the SVP Act, a person must have either been found guilty of a criminal offense, have been found to have committed the offense, but not guilty by reason of insanity, K.S.A. 22-3220, 3221 or must be proven to have committed the offense beyond a reasonable doubt at the commitment hearing if he is incompetent to stand trial in a criminal proceeding. K.S.A. 59-29a07(b). As a result, a factual determination that a person has committed a crime is a precondition of commitment under the SVP Act.

The fact that the commitment is conditioned upon proof of the commission of a crime is "significant of penal and prohibitory intent." *Kurth Ranch,* 114 S.Ct. at 1947. In *Kurth,* only an arrest for possession of an illegal drug was required to impose the tax. In proceedings under the SVP Act, a much closer connection is required. A person must have been found beyond a reasonable doubt to have committed a criminal act for the sanction to be imposed.

The link between the commission of a criminal act and the imposition of a second sanction has been used by the Court in earlier decisions as a factor in determining that

the second sanction violated constitutional protections. In *Lipke v. Lederer*, 259 U.S. 557 (1922), the Court examined the requirement that, "[e]vidence of a crime (Section 29) is essential to assessment under section 35" in determining that the "tax" levied for illegal manufacture or sale of liquor was a penalty. The same examination and the same 'result occurred in *United States v. La Franca*, 282 U.S. 568 (1931).

The SVP Act serves the purposes of punishment by incapacitating persons committed under its provisions. The confinement is in a DOC facility where the regimen closely resembles that of DOC inmates. The stigmatizing label of "sexually violent predator" is applied to committees. Only those who have been found beyond a reasonable doubt to have committed a criminal act are subject to the Act. With the procedural, factual and historical parallels to a criminal punishment, this Court should find that commitment under the Act is punishment.

II. THE SEXUALLY VIOLENT PREDATOR ACT VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST *EX POST FACTO* LAWS

Article 1, Section 9 of the Constitution of the United States provides, "No State shall . . . pass any . . . *ex post facto* law."

An *ex post facto* law has been defined as:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*"

Miller v. Florida, 482 U.S. 423, 429 (1987), quoting *Calder v. Bull*, 3Dall. 386, 390 (1798). (Emphasis in original)

One purpose of the clause is to restrain legislatures from enacting arbitrary, vindictive or oppressive legislation. *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Miller v. Florida*, 482 U.S. at 429; *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). A legislature's "responsivity to political pressures poses a risk that [it] may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1497 (1994).[14]

As we have demonstrated, the 1994 Kansas Legislature was inundated with demands to keep persons who were in prison for convictions of sex crimes locked up indefinitely. The legislature was spurred on by a terrible crime and a demand for protection of the public. While the criminal law could constitutionally provide for that protection by threatening severe sanctions for individuals who might commit crimes in the future, it could not satisfy the concern that those already sentenced had been dealt with too leniently. The SVP Act was passed to insure that already sentenced individuals would be further punished. The legislative history leaves no doubt that vindictiveness against the ever unpopular class of sex offenders led to legislative overreaching.

Another of the abuses sought to be guarded against by the *ex post facto* clause is that of punishing an individual when no fair warning is given about the consequences of his actions. *Miller*, 482 U.S. at 430; *Weaver*, 450 U.S. at 28. At the time of the commission of his 1984 crimes, Mr. Hendricks had no warning that he could be incarcerated in a prison mental facility indefinitely, after he served whatever sentence was imposed. He had every reason to believe that after serving whatever sentence was

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[14] In *California Department of Corrections v. Morales*, 115 S.Ct. 1597, 1609 (1995), Justice Stevens in his dissent noted: "The danger of legislative overreaching against which the *ex post facto* clause protects is particularly acute when the target of the legislation is a narrow group as unpopular (to put it mildly) as multiple murderers."

imposed, he would be free from any more restraints on his liberty arising out of those actions. He has committed no other acts on which the State can base his continued incarceration.

The Constitution "forbids the application of any new punitive measure to a crime already consummated." *California Department of Corrections v. Morales*, 115 S.Ct. 1597, 1601 (1995). The Sexually Violent Predator Act applies to events occurring before its enactment. The basis for its application to Respondent is his 1984 conviction. The Act obviously operated to increase the sentence of the Respondent. The adjudication operated to transform a sentence with a release date in September, 1994, which Respondent had earned by accumulation of all possible good time, into an indefinite and probable lifelong confinement.

For the reasons stated earlier, the Court should find the Act is punitive in purpose and effect. Because the Act is also both retrospective in application and operates to the increase Respondent's punishment, it must be overturned as a violation of the *ex post facto* clause.[15]

III. RESPONDENT'S ADJUDICATION AND INCAPACITATION AS SEXUAL PREDATOR CONSTITUTES A SECOND PROSECUTION AND PUNISHMENT, IN VIOLATION OF DOUBLE JEOPARDY

In 1984, Respondent entered into a plea agreement with the State of Kansas in which he admitted his guilt to two counts of indecent liberties. In return for Mr. Hendricks' waiver of his constitutional rights, the State agreed to recommend that the defendant receive concurrent terms of 5-20 years imprisonment. Ten years later,

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[15] Even if the Court does not find the Act as a whole to be a criminal scheme, the *ex post facto* clause may still be offended by a "civil" law. Such a[n *ex post facto*] law may inflict penalties on the person. . . " *Fletcher v. Peck*, 6 Cranch 137, 138, 162 (1810). While the new law must be penalizing, there is no requirement that it be a criminal enactment. *Collins*, 497 U.S. at 46.

as Respondent was ready to be released from the sentence recommended by the State, the same District Attorney's office that had agreed to the plea bargain filed the sexual predator petition. The sexual predator statute required that, in order to be charged, Respondent have suffered a conviction for a crime of sexual violence, and the specific conduct charged in the petition was Respondent's prior conviction of indecent liberties. The commitment proceeding was in form and effect indistinguishable from a criminal procedure resulting in a new criminal sentence, a second prosecution against Respondent for his crime. Even if it is not regarded as a second prosecution, his commitment is clearly a consecutive indeterminate punishment for his criminal activity. The State's proceedings against him violates double jeopardy.

A. The Sexual Predator Proceedings Against Respondent Constituted a Second Prosecution

This Court has held on numerous occasions that the Double Jeopardy Clause protects a criminal defendant from being prosecuted a second time after conviction of the same offense. *Witte v. United States*, 115 S.Ct. 2199 (1995); *United States v. Halper*, 490 U.S. at 439, 440 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). This protection expresses the idea, "deeply ingrained in at least the Anglo-American system of jurisprudence, that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.". *Green v. United States*, 355 U.S. 184, 187 (1957). Thus, in the analogous case of *Breed v. Jones*, 421 U.S. 519, 529 (1975), where the court held a "civil" juvenile proceeding which was then followed by an adult prosecution for the same crime to violate double jeopardy, the Court noted that because of the nature and resources of the State, "such a proceeding imposes heavy pressures and burdens—psychological, physical and financial—on

a person charged" which the individual should only be required to bear once.

All of these interests were implicated by the State's conduct in this case. Ten years after Respondent had been placed in jeopardy, entered a guilty plea, and was sentenced for an offense, he was charged, detained, subjected to a lengthy hearing, and ultimately remanded to potentially life-long custody. Since the setting and stakes were at least the equal of his original criminal adjudication, and since, as we have demonstrated, the Sexual Predator Statute is essentially a criminal proceeding, the successive prosecution by the same district attorney's office implicated Respondent's interest in double jeopardy.

B. The Second Prosecution was for the "Same Crime" as Respondent's Conviction for Indecent Liberties

In this case, the State secured in 1984 a conviction against Respondent for indecent liberties, and it then secured a finding that he was a sexual predator, which required his commission of a crime of "sexual violence" based upon that indecent liberties conviction. No conduct committed after the conviction was either charged or was required to be proved.

In determining whether a second prosecution has occurred for the same offense, the Court has inquired whether "each offense contains an element not contained in the other." *United States v. Dixon*, 509 U.S. 688, 696 (1993) (quoting *Blockburger v. United States*, 284 U.S. 299, 302 (1932)). By its terms, the sexually violent predator act requires that the defendant have been convicted or charged with a "sexually violent offense" and it expressly lists "indecent liberties with a child as defined in K.S.A. 21-3503" as one of the sexually violent crimes. K.S.A. 59-29a01(a), (e)(2). Proving the defendant's commission of a sexually violent offense invariably proves one of the two requirements of a commitment, with the State being left to prove that the defendant continued to have a mental abnormality or personality disorder predisposing him toward sexual violence.

In light of this statutory structure, the underlying sexually violent offense is "a species of lesser-included offense", *Illinois v. Vitale*, 447 U.S. 410, 420 (1980), with the greater offense, the sexual predator commitment, incorporating and requiring proof of the same elements as the sexually violent offense. Since the defendant was already convicted of the lesser crime, conviction on the greater violates double jeopardy. *See Brown v. Ohio*, 432 U.S. 161 (1977) (defendant convicted of lesser included offense of joy riding cannot be reprosecuted for greater offense of auto theft).

As this Court has repeatedly made clear, the fact that the State has set forth more than one sexually violent offense that can potentially trigger a sexual predator hearing does not change the analysis. As long as in the present case proof of the lesser crime is necessary, double jeopardy is implicated. For example, in *Whalen v. United States*, 445 U.S. 684 (1980), the Court held that a defendant could not be separately punished for rape and for felony murder based on killing the victim in the course of the rape. The government argued that the greater offense (felony murder) does not always require proof of the lesser (rape), since the predicate offense, according to the government, could have been some other lesser felony. The Court rejected the argument, noting that "in the present case," proof of the particular lesser crime, rape, was a necessary element of the felony murder. Cases both before and after *Whalen* are fully consistent with this view. Thus, in *Harris v. Oklahoma*, 433 U.S. 682 (1977) (per curiam), the Court held that where the defendant was convicted of a felony-murder based upon a robbery with a firearm, he could not thereafter be prosecuted for the underlying robbery offense. *See also United States v. Dixon*, 509 U.S. 688, 697, 698 (1993); (opinion of Scalia, J., and Kennedy, J.) (where contempt sanction was based on violating the terms of a conditional release, and those terms prohibited violating any criminal law, defendant could not subsequently be prosecuted

for violating the drug offense on which the contempt sanction was based.). Because, in this case, the State was required to prove a sexually violent offense, and because the state specifically charged the Respondent with having been convicted on November 1984, of the sexually violent offense of indecent liberties, in violation of K.S.A. 21-3503, precisely the offense of which he had been convicted 10 years before, the predator proceeding constituted a second prosecution for the same offense, in violation of double jeopardy.

C. The Sexual Predator Commitment Constitutes a Second Punishment

Even if the Court does not agree with our submission that the Sexual Predator proceeding is a second prosecution, it nevertheless violates double jeopardy because it consists of a second punishment, indeed a consecutive indeterminate lifetime commitment, for Respondent's offense of indecent liberties. This Court has repeatedly emphasized that the Double Jeopardy Clause serves the function of preventing both successive punishment and succesive prosecution, *Witte v. United States*, 115 S.Ct. 2199, 2204 (1995); *Dixon*, 509 U.S. at 704; *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969) and that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as being twice tried for it." *Witte*, 115 S.Ct. at 2204 (*quoting Ex Parte Lange*, 85 U.S. (18 Wall. 163) 173 (1874)).

In *Lange*, the defendant had been convicted for a crime authorizing payment of a fine and or sentence of imprisonment. The court mistakenly sentenced him to both and, after the defendant paid his fine and served five days of his term, he filed a writ of habeas corpus. The trial court attempted to vacate its earlier judgment and reimpose a new sentence of imprisonment. The Supreme Court ordered the defendant released and held that once he had served either lawful part of his previously-imposed sentence, the "power of the court to punish further was

gone." *Id.* at 176. The Court reasoned that the protection against double jeopardy would be of little value if after judgment were rendered against a criminal and sentence executed, "he can again be sentenced on that conviction to another and different punishment, or to endure the same punishment a second time." *Id.* at 173.

Succeeding cases have interpreted this principle to protect a defendant "against additions to a sentence in a subsequent proceeding that upset a defendant's legitimate expectation of finality." *Jones v. Thomas*, 491 U.S. 376, 385 (1989). Thus, "when the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *United States v. Halper*, 490 U.S. 435, 451 n.10 (1989).

The sanction imposed upon Mr. Hendricks in the sexual predator proceeding is an attempt, thinly veiled at best, to seek an additional term of incarceration because the State now believes it may have been too lenient in its criminal adjudication. The State fully possessed the power, in 1984, to seek a lifetime indeterminate sentence of incarceration, with provision for treatment and the possibility of release, upon Mr. Hendricks, as a result of his crime of indecent liberties. The decision of the same prosecutor's office that entered into the plea bargain against Mr. Hendricks to now seek this consecutive indeterminate incarceration touches upon the most basic and long-standing reasons for protection against multiple punishment.

Despite the "civil label of convenience," (*see Breed v. Jones*, 421 U.S. 519, 529 (1975)) attached to the Sexual Predator Act, there is simply no question of its punitive nature. (See Part I). As this Court recognized in *Specht*, there is really no difference between incapacitative confine-

ment pursuant to a criminal offender statute and this type of "civil" commitment. The consequence of the adjudication include both the stigma of being labeled a "predator," a designation at least as devastating as that of being labeled a criminal, and the deprivation of liberty for many years. *Compare Breed*, 421 U.S. at 529. As in *Breed*, the Sexual Predator statute carries the two most telling features of criminal punishment, the requirement of a finding of guilt for past conduct and incarceration had upon that finding. Moreover, as the Kansas Supreme Court correctly found, the State's alternative purpose assigned to its statute, that of "treatment", is "incidental at best" to its primary purpose of incarceration, and cannot render the statute remedial.

Respondent was fully punished for his crime committed in 1984. Respondent never denied he was criminally responsible, and the State never argued he was mentally ill. The State does not argue that Respondent's condition has changed; indeed, it argues that it has been the same for decades. Apparently, the State now believes it should have imposed a greater punishment in 1984 than the sentence it in fact recommended. However, it would be a violation of the most basic policies underlying double jeopardy to allow the State to act upon that belief and incarcerate this 60 year-old, whose sentence has expired, for the rest of his life.

CONCLUSION

Mr. Hendricks requests that the Court affirm the judgment of the Kansas Supreme Court.

Respectfully submitted,

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